

Fear and Trembling in Criminal Judgment

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JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* (Yale University Press 2008)

The day I finished this book, a verdict was rendered in the second murder trial of the famous record producer Phil Spector here in Los Angeles. I watched a clip on the evening news of the foreperson of the jury, speaking about the jury's efforts. In obvious emotional distress, her voice breaking and eyes tearing up, the foreperson described how painful the decision had been. "For anybody in our shoes, you have no idea. . . . It's tough to be on a jury."¹ The jury had heard weeks of testimony and spent some thirty hours deliberating before finding Spector guilty of second-degree murder. The first trial in the case had ended in a mistrial, the jury having been unable to agree on a verdict.

Author James Q. Whitman would not have been surprised at the foreperson's distress. He would likely say that early English jurors had the same experience, only worse. Indeed, the essential message of this fascinating work of legal history is that a key problem in the creation of jury trials was the emotional anxiety of jurors, which made them reluctant to convict for the most serious offenses. Jurors did not want to convict even the obviously guilty in some cases, especially where death was the penalty. Nor was this a new problem for the law. Premodern legal systems had faced the same reluctance on the part of participants, or even potential participants, to contribute to a conviction that would lead to imposition of the most serious forms of punishment.

The solution of the English common law to the problem of conscience-stricken jurors—the reasonable doubt standard of guilt—was drawn from medieval Christian theology about judgment, Whitman says. The twist is that, per Whitman, this standard was originally designed to boost convictions by giving jurors moral reassurance in finding a defendant guilty. This is nearly the opposite of the modern view of the rule, which is seen as aimed at ensuring fact accuracy, and especially, preventing the conviction of the innocent.

Whitman's book documents just how different the premodern and early modern Western world was from ours today. Once the most difficult criminal cases were resolved by physical ordeals, blessed by clergy that called on the judgment of God; today we have elaborate criminal trials overseen by judges

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¹ *Phil Spector Jury Says Verdict was a 'Painful' Decision*, TELEGRAPH, Apr. 14, 2009, <http://www.telegraph.co.uk/news/newstopics/celebritynews/phil-spector/5152798/Phil-Spector-jury-says-verdict-was-a-painful-decision.html>.

decided by jurors according to well-developed and entirely secular law. In earlier ages, many feared damnation by God for wrongfully condemning an accused. Today the decision-maker's greatest fear is making a mistake about the facts, leading either to the conviction of an innocent person, or the acquittal of a guilty one.

Whitman argues that American criminal law has not come to grips with this fundamental change. In particular, he argues that the proof beyond a reasonable doubt rule is archaic, at least as currently stated. He categorizes it as a moral comfort rule, originally designed to assuage the emotional/religious anxieties of decision-makers, and asserts that it does not serve well the needs of modern criminal decision-makers who are primarily concerned with fact-finding. I am not convinced, at least not entirely. I will argue that Whitman's view of moral comfort rules as archaic depends on a view of decision-maker anxieties, religion, and criminal adjudication, each of which can be questioned in important respects.

Whitman also argues—and here fully I agree—that there is a lesson for modern decision-makers in the experience of our predecessors. A basic challenge of criminal law remains how to structure legal responsibility so as to reassure conscientious decision-makers about the rightness of their decisions, but without providing so much reassurance that they become morally casual about rendering judgment. Whitman argues modern law has done a good job of developing procedures that ease the individual decision-maker's sense of responsibility for imposing serious punishment—perhaps too good a job. Especially with respect to the imposition of severe punishment, he says that criminal law decisions should be approached with more of the “fear and trembling” that our ancestors reported in facing their most serious judgments. I concur. This may be the most important lesson of this history.

The *Origins of Reasonable Doubt* is fundamentally about responsibility for imposing the worst criminal punishments: both the actual division of legal responsibility, and the various participants' sense of responsibility. Whitman identifies two different responsibility challenges for any criminal decision-maker: (1) the assessment of factual proof; and (2) making moral judgments about defendants and their conduct. Whitman is most concerned with the latter, arguing that it was the preeminent concern of premodern criminal law. Fearing divine damnation for wrongfully condemning a fellow human being, victims were reluctant to accuse, witnesses were reluctant to testify, and judges—and later jurors—were reluctant to convict.

This review opens with an overview of the legal and theological history Whitman provides. We begin with premodern legal systems in both England and on the continent that relied on physical ordeals to resolve the most difficult cases. We proceed to the replacements of the ordeal in the early Middle Ages: the inquisitorial system on the continent and jury trials in England. Finally we track the emergence of the modern criminal jury system and the beyond a reasonable doubt standard in Anglo-American criminal justice in the late 18th century.

Next we move to critique, focusing particularly on Whitman's distinction between factual proof and moral comfort rules. The issue, both historical and contemporary, is whether moral comfort rules were (and are) essentially addressed to the nonrational anxieties of decision-makers, or whether they also addressed (and address) real problems in moral judgment. This inquiry leads to questions about Whitman's treatment of religion, and the possibility that several scriptural sources he cites might provide, even today, important limits on criminal judgment.

Finally, we take up what Whitman sees as the modern implications of the history. These range from questions about contemporary jury instructions on reasonable doubt to larger concerns about fact-finding by American criminal juries. But the most important implications of this history may be how we approach decisions to impose severe punishment, especially long-term incarceration.

I. THE HISTORY IN BRIEF

Initially, a caveat for prospective readers of this book. This is essentially a work of medieval intellectual history. It traces the origins of the beyond-a-reasonable-doubt rule through Christian theology and legal thought from the beginnings of Christianity through the latter part of the 18th century, but focused primarily on the Middle Ages, which is to say that this is not a work of modern history. Unlike Whitman's first book, which explored the origins of modern Western punishment methods in order to explain why contemporary United States and European approaches to incarceration are so different, the link between this history and contemporary policy is attenuated.²

The book also involves a lot of theology. The subtitle provides fair warning: "the theological roots of the criminal trial." There's more on early Christian writers like Ambrose, Jerome, Augustine and Aquinas, than common law figures like Bracton, Coke or Blackstone. Still, those interested in the origins of modern criminal adjudication in the West, especially in the origins of the jury trial, will find riches here. All but experts in English and Continental legal history will learn much, and I suspect even legal historians of the period will find new insights. Just to be clear, I am not one of those experts. For the most part, I take the history presented here at face value.

This is a work of intellectual history, which means that the social and economic aspects of the transition from medieval to modern times do not receive much emphasis. Similarly, the politics of criminal law is only an occasional concern. Whitman notes the role of monarchical power in the 13th century origins of the jury trial in England, but other political aspects of the tale, particularly the jury's role in the 17th century creation of English liberties and 18th century American civil rights, receive relatively short shrift. But this is more observation than criticism. No work covering this span of history can encompass all

² JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

dimensions. And as to the 17th and 18th century politics of the Anglo-American jury trial, that story has been told often and well elsewhere.

Whitman's story is essentially that of the origins of the jury trial. The beyond-a-reasonable-doubt standard provides the question driving the account, but the account itself is of the creation of modern adjudicative systems.

Whitman structures his history around a distinction between rules concerned with factual proof and those designed to provide what he calls moral comfort (P. 6.) Factual proof is our modern preoccupation, Whitman states. (Pp. 20–21.)³ We are primarily concerned in criminal trials today with factual accuracy: making sure that those who actually committed the crime are convicted and those who did not are acquitted. In highly populous urban settings, criminal trials normally involve the conduct of strangers—indeed contemporary rules of procedure almost insist on this—meaning there is more need for fact-finding in the trial today. We would never describe a contemporary trial as “confirming” an accusation of guilt, as was common in the early modern setting. (P. 195.)

By contrast, moral comfort rules address not factual doubt, but moral doubt. They attempt to meet the emotional and spiritual needs of the decision-maker asked to convict a defendant who will suffer bodily mutilation or death as a result. Whitman argues that premodern systems needed rules that would assuage the moral and spiritual anxiety of the judge (and later juror) who feared condemnation by God for making a mistake in judgment, especially one that would lead to a blood punishment: death or maiming. Whitman states that providing such moral comfort was one of the main functions of the ordeal in the premodern era, and was equally important in the development of the inquisitorial law of the Continent and the jury trial in England.

Whitman's legal story begins with ordeals, those extraordinary physical tests, called “judgments of God” because they called upon the divine to decide human disputes.⁴ The notion was that a physical test, blessed by clergy, could reveal God's judgment upon an individual. The main types were ordeals by hot iron, cold water, and trial by battle. (P. 53.) Each method constituted a physical test of the defendant which, through interpretation or physical death (especially in the case of battle), would render a legal verdict on past wrongdoing.

The status of the defendant affected the choice of ordeal. Low status offenders were likely to face the ordeals of hot iron or cold water. In the hot iron ordeal, a defendant's hand was burned with a hot iron, then wrapped. Three days

³ This may be true at many trials, but it does not seem true overall of contemporary criminal procedural law. George Thomas and others have written about the way that modern U.S. law's preoccupation with constitutional procedural rules has actually undercut the criminal justice system's commitment to factual accuracy. See GEORGE C. THOMAS III, *THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS* (2008).

⁴ Whitman actually begins with a brief account of non-Western religious and cultural traditions that illustrate a reluctance to impose severe judgments, and then explores Christian theology of just war and just punishment, which provides the philosophic foundation for medieval understandings of justice. (Pp. 10–49.)

later it was unwrapped and examined for signs of healing. Infection signaled God's judgment of wrongdoing.⁵ In the cold water ordeal, a naked defendant was bound and thrown into a body of water. If the individual sank to the bottom, that was a sign that God was ready to receive the person, and hence he or she was innocent. If the accused floated to the surface, that was God's rejection, hence a conviction.⁶

High status offenders had the option of trial by battle. Here the accused would take on the accuser in mortal combat personally, or would hire a champion to do battle with the accuser or the accuser's own champion. The winner of the combat would also be the winner of the legal case.⁷

As other historians have noted, the rate of acquittals by ordeal was surprisingly high. Even these daunting methods could not guarantee conviction. (P. 65.)

Whitman argues that ordeals such as these (and these were just the most popular, there were others) were not primarily fact-finding devices. The ordeal did not serve the function of the Greek oracle, looking to another realm to find truths hidden from ordinary mortals. Against the view of some other legal historians, Whitman states that the ordeal was not about resolving fact disputes: "Instead, what mattered most about the ordeal was their capacity to spare human beings the responsibility for judgment." (P. 56.)⁸

Ordeals also did some very practical work, addressing major deficits in existing law. Premodern law, outside of ordeals, was poorly equipped for criminal prosecution generally. The ordinary legal process required an accuser, an individual who would formally charge another with wrongdoing. The problem was that making an accusation put an individual at great legal, physical and social risk. Making an accusation was legally risky, because if the accuser did not prevail in the case, the accused might then become the accuser, bringing equally serious charges against the original complainant for false accusation. (Pp. 60–61.)

Similar to gang violence in some communities today, formal accusation or witness testimony could also put the participant's life in physical jeopardy. This was a society where vengeance killings were common, and even a matter of family honor. Finally, although Whitman does not emphasize this, it must also have been true that in small communities there were powerful social and economic disincentives to both accusation and testimony leading to conviction in some cases.

⁵ For a good description, see ROBERT BARTLETT, *TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL* 1 (1986).

⁶ *Id.* at 2.

⁷ *See id.* at 103–126.

⁸ One also wonders if the ordeal also functioned simply to resolve disputes, privileging finality over case justice. In a small community, a final judgment, even if erroneous, might be preferred to the lingering resentments and vengeance that an unresolved dispute could foment over months, years and even generations. I should make clear this is just my own speculation, however.

Per Whitman, ordeals were a last resort legal measure, used when, despite widespread belief in the guilt of the defendant in the community, prosecution in the ordinary course was impossible. He sets out four basic obstacles to prosecution: there was no accuser, no witness willing to testify about the crime, no confession by the wrongdoer, and, for the high status wrongdoer, no purgative oath to resolve the case. (P. 60.)⁹ The last of these obstacles requires some explanation; it also serves to introduce the medieval fear of damnation that is central to Whitman's account.

In premodern law, a high status offender could be acquitted of charges by taking an oath and swearing to his or her own innocence. Such an oath needed to be supported by others who would swear to the oath taker's character and credibility. To the modern reader, this sounds ludicrous. What would stop the high status (read here powerful) accused from simply swearing to innocence and getting his friends to do the same? But as Whitman's account demonstrates, this was not the way it worked, at least not commonly. Oaths, taken in God's name and usually upon holy relics, were fearsome acts for medieval believers.¹⁰ Whitman states that many high status offenders preferred trial by battle to taking such oaths, fearing that they might be tempted to commit perjury or otherwise violate the terms of the oath and thereby damn themselves to hell. Whitman quotes Thomas of Chobham in the 13th century, explaining why sworn testimony was spiritually risky:

[T]o take the name of God while declaring a falsehood is most evil, for God neither wishes to be, nor is capable of being, a false witness. He who makes God into a false witness in order to prove something thus does a great injury to Him. For it is perilous to invoke God as a witness to something about which man is not certain. (P. 75.)

The beginnings of modern criminal procedure are often dated to the Fourth Lateran Council of 1215, convened by Pope Innocent III, which prohibited clergy from participating in ordeals. The rationale was twofold. Clergy participation in the inherently bloody ordeals was thought to pollute clergy with bloodshed,

⁹ Whitman offers a fascinating and disturbing historiographic critique of the history of the ordeal in the work of its "Grand Old Man," German historian Hermann Nottarp. Although Nottarp's work is apparently widely cited, Whitman relates how Nottarp's interpretation was influenced by his Nazi beliefs, as he saw the medieval judicial ordeal as a mechanism to uncover the degeneracy of certain members of the *Volk* (people), a process which Nottarp explicitly linked to contemporary (Nazi) concerns with degeneracy in the population. (Pp. 68-69.) Whitman lays considerable blame on Nottarp for the view that ordeals were about fact-finding. Whitman says that Nottarp distorted the historical record to accord with his view that brutal investigative methods were necessary when the law was faced with degenerate persons who would otherwise hide the truth. (Pp. 69-71.)

¹⁰ The power of the oath and its role in the prosecution of suspected heretics played an important role in the history of the Fifth Amendment's privilege against self-incrimination. See generally LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* (1968).

ruining their purity. This goes back to one of the oldest concerns of the church, that its representatives not be stained by bloodshed in war or otherwise.¹¹ Second, the decree stated that it was wrong to test God, by calling on God's judgment for matters that humans could resolve for themselves. (P. 53.)¹²

The effect of this decree, almost immediate in England, and much more gradual on the Continent, was to require legal authorities to construct an entirely secular process for deciding the most difficult criminal matters. In England, the solution was the jury trial; in Europe, the inquisitorial method. Whitman argues that the main challenge for both systems was to provide a method that would compel accusation and testimony while at the same time providing a measure of moral protection (safety from damnation) for judges.

The inquisitorial method served these ends through the development of an elaborate law of evidence and investigative process. A person could not be convicted except according to full proof, a legal term which required at least two highly credible witnesses, or a confession. Half proof—a specified quantum of credible evidence—could support the use of torture, which might then be utilized to obtain a confession and therefore full proof. Witness testimony could also be coerced through legal means. (Pp. 99–100.) Meanwhile the souls of judges who ordered torture and punishment based on full proof were protected by the very rigidity of law that they applied. Judges could attribute their actions entirely to the law and not their own conscience.

A central principle of the inquisitorial method, its basic conception of due process, was that the judge should render decisions based solely on legally constituted evidence and not the judge's private knowledge of the defendant or the controversy. A familiar concept to modern law, the judge was to consider only the evidence in the legal record and not what the judge might have personally observed, known by reputation, or even heard in confession (as educated leaders of the community, clergy often served as judges, quite apart from any role in ordeals or church duties). As Whitman points out, being part of a small community, judges might well have their own knowledge about the facts of a criminal case.

As so often happens in law, what seemed an indisputable and universal principle of justice was called into question when it conflicted with another critical justice value, here the need to avoid convicting the innocent. Medieval legal and theological commentators were greatly concerned with the following hypothetical: What if the legal evidence in the case supported conviction, but the judge knew from private knowledge that the accused was innocent? The authorities were, as

¹¹ Whitman traces an early theological concern with pollution by contact with blood, that he associates with the Jewish notion of *kashrut*, with a later specifically Christian concern about pollution relating to the guilt of the person punished. (Pp. 31–49.)

¹² It was a theme of Jesus' ministry, as depicted in the Gospels, that God was not to be tested by demanding cheap supernatural tricks from the divine. See, e.g., MATTHEW 4:5–7 where the devil dares Jesus throw himself off the highest point of the temple in Jerusalem, citing scripture from the Psalms, that he would be saved by the Angels if he were truly the Messiah. Jesus responded by quoting DEUTERONOMY 6:16: "[i]t is also written: 'do not put the Lord your God to the test.'"

we say, divided. The great theological and legal authority Augustine held that even here, private knowledge must be excluded. Otherwise, the whole justice-as-law edifice might crumble. Should an innocent person be convicted as a result, the fault would lie with the witness or witnesses who testified falsely, and not with the judge who entered the conviction based on the legal record. (P. 113.) Augustine assured the legally rigorous judge: "So long as you do not use your private knowledge, it is the law that kills him, and not you." (P. 112.) Other authorities in continental law disagreed and suggested a variety of means by which the judge might avoid wrongful conviction and yet abide by the basic principle that the legal process should not be contaminated by private knowledge. (Pp. 113–14.)

Meanwhile, in England the criminal process developed in a quite different fashion. Judges were largely protected from the risk of damnation by the extraordinary new institution of the trial jury. The powerful English monarchy, wanting to extend its authority over local powers, particularly church officials and nobles, saw the elimination of ordeals as an opportunity to expand its jurisdiction. The king resolved to transform the already existing presenting jury into a body for adjudication, presided over by royally appointed judges.

Prior to these changes, the presenting jury had served as a kind of grand jury, bringing formal accusations of crime, especially homicide, according to the knowledge of its own members. It provided a means for the king to compel criminal accusations. But beginning in the early 13th century, the jury took on new roles, being required not only to accuse, but to provide testimony, and most importantly, to issue a final verdict on guilt. Whitman traces the way in which juries took on these new roles both in land disputes and in serious criminal cases, controversies that were apparently of nearly equal moment in feudal England. (Pp. 126–44.)

The development of the jury eased the responsibilities of the judge. The judge no longer bore the moral weight of defendant's condemnation in serious criminal cases. The judge simply followed the legal dictates of the jury's verdict. In Whitman's terms, the judge's soul was protected from divine judgment even where the bloodiest punishments were imposed. Jurors were not so fortunate.

Whitman documents the extraordinary responsibilities of criminal jurors in early modern England. They were to serve as witnesses, using their own private knowledge of the matter, if available. Whitman shows how the English common law system contemplated juror use of private knowledge well into the 18th century. (P. 152.) In *Bushel's Case*, one of the landmark 17th century cases concerning criminal juries, Chief Justice Vaughn upheld the jury's right to acquit in the case based on the possibility that jurors decided the case based on their own private knowledge as opposed to the public evidence. (Pp. 177–78.)

Nor could jurors reassure themselves that they were simply following an elaborate set of proof rules. English common law lacked the mechanistic categories of full and half proof characteristic of the continent's inquisitorial method. Instead, jurors were required to rely heavily on their own consciences to evaluate the evidence and make just decisions. (P. 153.)

And if all this were not enough, jurors faced a variety of judicial sanctions for failing to reach the “right” verdict. In the early modern era, jurors in land dispute cases could face a subsequent prosecution for attain brought by the losing party. (Pp. 140–44.) In criminal cases, jurors could be fined and sometimes imprisoned. The infamous Star Chamber frequently prosecuted criminal jurors post-verdict for alleged wrongdoing in decision-making. (P. 162.) Meanwhile, trial judges commonly coerced jurors to reach verdicts by locking them up without food or water until they reached a decision. And we complain about jury duty today!¹³

But Whitman also describes a number of ways that English law provided juror relief from the worst of their moral and spiritual burdens. He argues that the rule of juror unanimity was developed not to ensure factual accuracy, but as a moral comfort rule. (Pp. 142–44.) Jurors would not feel themselves so individually responsible, if all shared in the decision.

Several measures that reduced the chance of capital punishment also relieved the moral pressure on jurors. Benefit of clergy doctrine meant that many otherwise capital cases were taken out of capital punishment. (P. 156.) The development of transportation as an alternative to the death penalty likewise diminished jurors’ emotional burdens for the most severe punishment. Finally, juries were permitted to return special verdicts in criminal cases, especially where affirmative defenses such as self-defense were involved. (Pp. 154–55.) This limited the jury’s role to factfinder, again reducing the jury’s responsibility for the ultimate punishment.

Whitman makes clear that the challenges of judging were a major preoccupation of early modern thinkers, both in the church and out. The church had its own judgment processes for regulating its affairs which required elaboration and justification. The new secular legal procedures also demanded explication and defense. In both realms, theological writing provided a major resource. Whitman documents the way Christian theologians, both Catholic and Protestant, developed distinctions between legitimate and illegitimate doubt in judging both religious and secular matters. Particularly important in England was the Protestant literature of conscience. Here writers distinguished between doubts and scruples. (P. 179.) Contrary to modern usage, “scruples” referred to highly emotional and largely irrational fears and squeamishness. A common example used by the commentators was a highly gendered (read here sexist) one. They described the screeches of a female on contact with a squirming frog or chicken. (Pp. 179–80.) Such fear had no rational basis, the animals being harmless. By contrast, “doubts” represented rational questions about the extent of knowledge. Jurors should not be influenced by mere emotion, by scruples, and thereby avoid doing their critical but onerous duty. They should, however, heed rational doubts, and take what was called the safer path, acquitting when there was any reasoned basis for uncertainty.

¹³ Punishment of jurors for allegedly erroneous verdicts was finally ended with the creation of the common law “liberties” following the English Civil War in the 17th century. (P. 162.)

From this theological literature, and from the particular needs of early modern jurors, arose the reasonable doubt formula. Whitman maintains that the formula was “intended to ease the fears of those jurors who might otherwise refuse to pronounce the defendant guilty.” (P. 186.) Writing of both jurors and judges, Whitman states the 18th century legal and religious ideal was “a reasoned decision [that] would leave the soul of the Christian judge safe.” (P. 191.)

The reasonable doubt formula appears in the Anglo-American legal record in a number of different places almost simultaneously in the late 18th century. John Adams’ arguments in defense of British soldiers charged in the so-called Boston massacre preceding the American Revolution is cited, as are a number of cases tried in the Old Bailey courthouse in London in the 1780s. (Pp. 193–99.) In accord with other legal historians, Whitman says the rule had no single author. He speculates that one reason for its appearance at this time might be due to the American Revolution, which temporarily ended transportation, and thereby put in question the future of severe punishment. (P. 200.) (For most of the 18th century, forcible transportation of prisoners to the American colonies provided the major alternative to capital punishment in England.)

II. FACTUAL PROOF V. MORAL COMFORT, RECONSIDERED

The first question to ask of this historical account, is whether its explanation is persuasive. Did the reasonable doubt standard and the jury trial arise as Whitman describes? Was Christian theology as important, and in the fashion that Whitman maintains? Frankly I am not equipped to critique the particular historical account that the author provides about ordeals and their successors in English and continental law. Here I must defer to others more expert in this area of legal history. But I do have some questions about Whitman’s understanding of moral comfort rules. Did these address essentially nonrational anxieties of decision-makers or did they also address serious concerns about moral judgments inherent in criminal law? Pursuing this question leads to further questions about the role of religion in criminal judgment historically, and today.

As we have seen, Whitman argues that premodern legal systems were less concerned with factual proof than are modern ones, and were relatively more concerned with the moral dimension of judgment than we are today. Although Whitman is persuasive about this distinction in some respects, there is an important ambiguity in his distinction between factual proof and moral comfort rules. Examined more closely, these seem to include two potentially different oppositions.

The first opposition, which seems the most important for Whitman, is between emotion and reason. While never stated in just this way, it is a clear subtext of the historical account. It is most clearly evident in the discussion of early modern writers who distinguished between illegitimate emotional scruples and reasoned doubt. The opposition accords with the traditional Western view (increasingly rejected today) of emotion as the rival of reason in decision-

making.¹⁴ Whitman reports that early modern decision-makers suffered from emotional, nonrational anxieties about judgment in cases where factual proof was clear. These anxieties were often expressed in religious terms—a fear of damnation. In Whitman’s account, moral comfort rules arose to assuage these historically-specific religious/emotional anxieties. The emotion-versus-reason dichotomy strongly supports Whitman’s contemporary argument that moral comfort rules, like proof beyond a reasonable doubt, are archaic because they address a problem—emotional/religious anxieties about judgment—that we no longer have.

But this is not the only way of understanding the factual proof versus moral comfort rules distinction. It might involve the difference between fact determination and moral judgment in criminal responsibility. Factual proof goes to basic determinations of who did what, while moral judgment concerns assessments of culpability and penal severity. This reading potentially views religion differently, not just as a source of fear and anxiety, but one that could provide moral guidance for the law. This reading may also change our modern perspective on so-called moral comfort rules. To the extent that these rules address concerns with moral judgment (as opposed to nonrational emotional anxieties), they would appear to have continuing significance today.

The ambiguity latent in the factual proof versus moral comfort distinction becomes apparent when we look more closely at Whitman’s basic argument. We can begin with his point that questions of factual proof were relatively less important in criminal cases in medieval and early modern times than they are today. This accords with some basic facts of demographics and law. In very small communities—and even cities in premodern times were small by modern standards—decision-makers likely had more personal knowledge about wrongdoing in the community than is true today, when judges and jurors are usually asked to resolve cases involving complete strangers.

But just how much of a difference is there between premodern and modern systems in their concern with facts? Surely there were still significant problems with factual proof in premodern times.¹⁵ Indeed Whitman concedes as much, though only in passing. (P. 19.) But what does seem clear from Whitman’s

¹⁴ Most of those working in the relatively new field of law and emotion argue that emotion often, or even always, has a rational basis and therefore the critical question for law is not whether emotion will affect legal judgment, but how it does, and how it should. See Susan A. Bandes, *Foreword, Symposium, Emotions in Context: Exploring the Interaction Between Emotions and Legal Institutions*, 33 VT. L. REV. 387, 387–88 (2009).

¹⁵ Certainly a modern observer might question the factual proof presented in a medieval or early modern legal proceeding. Knowledge of wrongdoing in a small community is often an amalgam of rumor, reputation, hearsay, and direct knowledge—not what we would today consider reliable. In pre-modern times, communities of course lacked access to modern investigative techniques, from the most basic methods of professional police investigation, to more scientific forms of evidence such as fingerprints or DNA. As a result, the modern fact-finder might have serious doubts about the sufficiency of the evidence presented in many pre-modern and early modern criminal cases.

account, is that there were a significant number of troublesome cases, which were troublesome not because of doubts about facts, but because of a variety of fears, including spiritual fears, of the consequences of accusation, testimony, and judgment.¹⁶ This supports the emotion-versus-reason understanding of moral comfort rules.

Whitman's historical argument also rests importantly on a contention about modern law, namely, that problems of factual proof predominate in contemporary criminal trials. Is this true? It depends on how we define factual problems. Certainly there are many criminal trials today where the critical issues are factual in the most basic sense. Was a homicide committed? If so, who committed the deadly act? Who fired the shot that killed the victim? Usually, though not always, these questions will involve straightforward fact matters such as proof that a person who was alive no longer is, and that death occurred by a bullet shot from a gun wielded by defendant. But most criminal trials focus more on *why* certain acts were done rather than what was done or by whom. They are more *why-dun-it* than *who-dun-it*. Issues of *mens rea*, affirmative defenses such as self-defense or insanity, are frequently critical, and these explicitly demand the fact-finder's moral judgment. Distinguishing between a murder and manslaughter based on provocation, between a sane and an insane defendant, require the decision-maker to make critical normative judgments, as well as make factual determinations. The anxious decision-maker may not worry so much about what happened, as about how it should be categorized under law. Facts and norms cannot be neatly distinguished, meaning that concerns with factual proof and moral judgment remain intertwined today. If moral comfort rules address the difficulties of moral judgment in assessing culpability, then perhaps not so much has changed over the millennia.

Now we turn to the role of religion in the development of moral comfort rules. Whitman argues throughout that decision-maker moral anxieties in premodern times were theologically based. Certainly they were often expressed in Christian terms. But he does not do enough, in my view, to explain what this means. Just how did the Christian accuser, witness, judge or juror believe that his soul might be at risk?¹⁷ Again, there are two possible readings of the relevant legal history.

¹⁶ There is another historiographic problem lurking here as well. To what extent did the historical actors Whitman writes about themselves distinguish between concerns about factual proof and moral comfort? One of the central trends of modernity, in law as in other fields, is an ever-increasing specialization of knowledge, including increasing linguistic precision. Just as the categories of evidence law and substantive criminal law and criminal procedure would not have been distinguished in pre-modern times, so this difference between moral comfort and factual proof is a modern one.

This introduces a caution. Because historical authors did not write with the precision of modern authors, we cannot be certain of their original meaning. What may sound to us like a worry about moral judgment may have included concerns about factual proof. The difficulty of distinguishing these categories can be seen even in modern adjudication.

¹⁷ To give an example, Whitman documents many instances of individuals fearful that they might violate an oath sworn to God by making factual errors, usually by lying. (P. 75.) The witness

One is that the anxieties of early modern decision-makers were essentially emotional as opposed to rational. In a religious age, fear of divine damnation caused some fact-finders to exaggerate any factual doubt, precluding conviction of even the clearly guilty. This seems to be Whitman's view.

Whitman generally takes a kind of anthropological view of religious belief, seeing it as a defining feature of a less rational, pre-scientific age. In a more religious time, doubts about guilt could be easily exaggerated, growing into a terror of damnation. "The slightest doubt may seem overwhelming, if we are uneasy about our own potential responsibility for the act of judgment." (P. 21.) In Whitman's view, moral comfort rules were, "addressed to the simmering inner fears of the anxious judge. Instead of offering a sober algorithm for assessing factual probabilities, they offer the judge a means of calming himself down." (Pp. 21–22.) Overall, this suggests the emotional, nonrational role of religion in both provoking fear and providing reassurance.

There's no question that early modern law was concerned with judges' emotional reservations about imposing harsh punishment. Such reservations are a basic part of the human condition. It feels bad to hurt another who has not personally hurt us. It goes against the moral grain for most of us. But from a legal perspective, a purely emotive reluctance to convict even those who appear factually guilty, is illegitimate. It is the equivalent of a soldier who refuses to fight. Just as the military creates rules and structures to ensure that soldiers fight on the battlefield, so rules and structures needed to be enacted to encourage judges and jurors to make tough decisions. This is basic to Whitman's argument—and makes sense.

Might moral comfort rules, though, have been designed to do more than assuage the nonrational anxieties of decision-makers?¹⁸ I suspect they were—rules so important almost always have multiple functions—but cannot pretend to make the historical case here. Instead I want to pursue a related, largely nonhistorical, inquiry. Using several of the scriptural sources that Whitman cites, I consider how these might provide moral guidance in criminal law.

Anxieties about imposing severe criminal punishment, whether ancient or modern, may stem from legitimate concerns about overstepping the bounds of human judgment. They encourage moral humility in judgment. In this regard,

who commits perjury, the judge who convicts the factually innocent, or the witness sworn to tell all who despite knowledge of the case states his own ignorance of the facts—these clearly put their souls at risk. But, from a modern perspective, these instances just describe basic moral failures. People know what they should do, but can't manage to do it. It's not clear why these examples would create particular anxieties for decision-makers about judgment. One possibility is that in an age where Christianity emphasized the sinfulness of humanity, decision-makers might need explicit reassurance that they had the moral virtue needed to tell and ascertain the truth in matters of great controversy. Perhaps decision-makers did not come to legal cases with the same moral confidence that most modern decision-makers do. This is not an argument that Whitman makes in the book, however.

¹⁸ Whitman does suggest that moral judgment is the concern of moral comfort rules. For example: "[O]ur ancestors dreaded . . . the *moral* and *spiritual* responsibilities of judgment." (P. 11.)

religion may provide a distinction between what humans may properly decide in judging each other, and what should be left for God's judgment.

III. LIMITING HUMAN JUDGMENT: ANOTHER VIEW OF CHRISTIAN SCRIPTURE

Whitman identifies several passages from the New Testament as especially important to early theological writers on judgment. The most often cited is Jesus' admonition: "Judge not, that ye not be judged."¹⁹ Unfortunately, Whitman does not discuss its interpretation in any depth. Like so many passages from scripture, it can be interpreted in several ways. For example, the admonition could mean that believers should eschew *any* form of judgment of human wrongdoing, that they should not participate in any legal process. This was never a popular interpretation, however, and certainly does not fit the legal history discussed here. There is another reading though: that believers should avoid any final condemnation of another human being, should avoid any final determination of individual worth, because only God can judge the soul.²⁰

This concern with the limits of human judgment can also be found, I believe, in another passage from Christian scripture that Whitman cites, although again Whitman does not use the passage to make this point. It is the story of Jesus and the woman accused of adultery.

In the Gospel of John (the only of the four Gospels in which this account appears) Jesus is tested by "the scribes and the Pharisees" who present him with a woman caught in the act of adultery. They state that the law of Moses commands that she be stoned to death.²¹ Asked what should be done, Jesus delays for a time, writing with his finger on the ground, and then says: "Let anyone among you who is without sin be the first to throw a stone at her."²² The group slowly melts away, beginning with the elders. Jesus continues writing on the ground. When the others are gone, Jesus says: "'Woman, where are they? Has no one condemned you?'" She said, 'No one, sir.' And Jesus said, 'Neither do I condemn you. Go your way, and from now on do not sin again.'"²³

Whitman calls this as an "antique" story. He provides a medieval interpretation that supported basic principles of inquisitorial law. According to the

¹⁹ MATTHEW 7:1 (King James). Whitman uses the King James version of the Bible, certainly appropriate to a discussion of early modern English law. The New Revised Standard Version, probably the preeminent English-language translation of the Christian Bible today is: "Do not judge, so that you may not be judged."

²⁰ See, e.g., Jeffrie G. Murphy, *Legal Moralism and Retribution Revisited*, 80 PROC. & ADDRESSES OF THE AM. PHIL. ASSN. 45, 55-60 (2006); JEFFRIE G. MURPHY, GETTING EVEN: FORGIVENESS AND ITS LIMITS 95-113 (2003). In Christianity, on the day of judgment, God will determine the ultimate fate of all mortals. E.g., MATTHEW 10:15; 11:22, 11:25; 12:36 (New Revised Standard Version [hereinafter NRSV]).

²¹ JOHN 8:2-5 (NRSV).

²² JOHN 8:6-7 (NRSV).

²³ JOHN 8:10-11 (NRSV).

medieval scholar cited, the account proved the necessity of following strict legal process: without a formal accusation, there could be no judgment. Jesus would not use his own private knowledge of the woman's sin to condemn her. (P. 108.) But this is hardly the only possible reading of this passage. Many have read, and do read the passage, as providing a message about the importance of mercy and the need to avoid condemning sinners.²⁴ This accords with a central theme of Jesus' ministry, namely, saving those—the unclean, tax collectors, prostitutes and others—who might be condemned by a strict reading of Mosaic law. It is also consistent with Whitman's own suggestion that modern criminal law may do too much to assuage the moral anxieties of criminal decision-makers in cases involving the most severe punishments.

Before proceeding to that modern critique, just a few last words about the treatment of religion in this book. When it comes to religion, there almost seems to be two different Whitmans here: the intellectual historian and the modern commentator. Whitman the intellectual historian takes religion and Christian theology seriously. He sees it as the key to a number of legal developments that other historians have badly misread. He convincingly documents the way in which a fear of damnation was a motivating force in medieval times as it is for relatively few today. And as we will see, he appreciates the wisdom in approaching serious criminal judgment with "fear and trembling." For all that, he deserves commendation.

But there is another Whitman, the modern commentator who seems openly dismissive of religion as a guide to moral or legal thought, who views its influence on law as archaic. For example, Whitman writes early on that the New Testament warning "Judge not lest ye be judged!" is "hardly more than a pretty piety for us." (P. 10.) Yet, as we have seen, these words could be a serious admonition about the limits of human judgment. These words could guide judgment, even today.

To make a legal analogy, the cynic, considering the reality of contemporary American criminal punishment, might dismiss the Eighth Amendment's prohibition against "cruel and unusual punishment" as fancy words, signifying little. And it is true that the words by themselves accomplish little, but as a constitutional command in a legal system that takes such commands seriously (or does sometimes), these words can have, and have had, major effects on adjudication and punishment. Abstract ideas can motivate serious action. And yes, sometimes those ideas may be religious even today.

The modern Whitman strongly suggests that religious belief is fundamentally primitive, verging on the superstitious. Thus, the beyond-a-reasonable-doubt rule, which found its origins in concerns with damnation, is "a living fossil from an

²⁴ Abraham Lincoln used this passage in his Second Inaugural Address, urging reconciliation between North and South as the Civil War came to an end. "It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces; but let us judge not that we be not judged." See RONALD C. WHITE JR., *LINCOLN'S GREATEST SPEECH: THE SECOND INAUGURAL* 15 (2002).

older moral world.” (P. 4.) Continuing with the evolutionary metaphor, Whitman writes of the present day, when the “seas of religion have receded, after many centuries. But the landscape of the law still includes many of its older diluvian features” (P. 7.)

The seas of religion have receded? For some groups, for some versions of religion, undoubtedly this is so. But the notion that modernity is nonreligious is demonstrably wrong. Many intellectuals wish that this were true. Some predict the day is approaching. But, it is not presently true in the United States where the author teaches and where this book is published.²⁵ Now, Whitman may be making a much smaller point, associating religion with a particular belief in damnation, but if so, he should make this critical distinction explicit.

The same discomfort with religion *qua religion* (that is, as a timeless source of moral and spiritual ideas) appears in Whitman's handling of scripture. Whitman pays considerable attention to medieval theological writers, but he does not handle particularly well the scriptural sources that should be at the heart of any Christian theological discussion. In fairness, some of these shortcomings may reflect the shortcomings of the medieval commentators who are his main subject. I believe, however, they also reflect a limited understanding of some critical source material.

Whitman's favorite scriptural quotation provides illustration. Whitman early on refers to the “famous injunction of Saint Matthew—*Judge not lest ye be judged!*” (P. 3.) Several times he attributes these words to St. Matthew. But the words come from Jesus, in his Sermon on the Mount, as *quoted* in the Gospel of Matthew. Matthew is the reporter, not the speaker, a distinction with a major theological difference.

Whitman frequently quotes scriptural passages without providing context, essentially assuming that the words can be taken at face value. But this method is no more useful in theology than in law. How much would we know about First Amendment principles, both with respect to the press and religion, from a bare reading of its text? At a minimum, scripture must be read in its biblical context, with attention to surrounding passages and larger themes. It is not self-explanatory. Recall again, “*Judge not, lest ye be judged*” and the differing interpretations mentioned earlier.²⁶ Or, the different readings of the story of Jesus and the adulteress, also mentioned above.

²⁵ For the role of religion and faith in U.S. life, see the Gallup poll figures at Gallup, <http://www.gallup.com/poll/1690/religion.aspx>. The importance of religion in recent presidential races in the United States also points out its contemporary significance to many.

²⁶ *Supra* note 19. In general, Whitman makes a sharp distinction between Judaism and Christianity, distinguishing between what he calls the Jewish and Christian scriptures, and generally treating Christianity as a later but distinctive outgrowth of Judaism. This was certainly the view of most medieval Christians, and probably many Christians today (and perhaps Jews as well), but one might argue that this reads back into history later religious and historical developments. One could say that modern Judaism and Christianity arose from the same tradition, at roughly the same time, and in reaction to the same critical event, the destruction of the Second Temple in Jerusalem in 70 CE (Common Era) by Roman forces. This Jewish disaster was exacerbated by the expulsion of most

IV. MODERN IMPLICATIONS OF WHITMAN'S HISTORY: THE IMPOSITION OF SEVERE PUNISHMENT

One of the great challenges of legal history, and an aspect that distinguishes it from other forms of history, is its normative dimension. In other fields of history it is sufficient to explain what happened. Historians ask: What were the causes of World War I? What impact did the abolitionist movement have on the politics of antebellum era? Answering these questions is difficult, and involves analysis as well as data collection, but they are explicitly queries about the past and not the present. The modern academic historian tries to determine what happened, sometimes including a critique of historical actors, but rarely with the aim of drawing explicit lessons for contemporary policy. The academic historian worries a great deal about presentism, the criticism that a historical account is distorted by being viewed through the lens of present day needs and biases. Lesson-drawing is usually left to politicians and teachers without PhDs.

By contrast, legal history concerns the history of law, meaning the history of legal norms. How could its history avoid the normative? Equally important, I suspect, most legal historians work within the legal academy, which is also intensely normative. While few legal historians today engage in so-called lawyers' history, (the study of ancient doctrine to inform contemporary legal decision-making), even the most sophisticated writers recognize the normative dimension of their accounts. Whether the subject is the law of slavery, antitrust, or the regulation of the family, historical accounts of the law have contemporary import. At a minimum, they reveal important aspects about the law's development, which may inform contemporary understandings of the nature of law and its practice.

I can make the point more plainly. At least on occasion, most legal historians must present their work to legal academics who are not historians. Papers will be delivered to audiences that include experts in administrative law, constitutional law, and criminal law, among others. Such presentations can be defining moments for any legal academic's career. The moment that all academics imagine during the writing process is when the floor is opened to questions following the paper's presentation, when some skeptical professor asks the "so what" question. So what difference does this make? What changes as a result of your insights? And, particularly for the legal historian, the question becomes: So what does this all

Jews from Judea less than a century later in 135 CE, also by the Romans in response to a Jewish revolt.

In the Jewish tradition, these events are usually seen as fostering the development of rabbinic Judaism, focused on scriptural study and synagogue worship as opposed to a Temple-focused religion dominated by a hereditary priestly class. See RAYMOND P. SCHEINDLIN, *A SHORT HISTORY OF THE JEWISH PEOPLE: FROM LEGENDARY TIMES TO MODERN STATEHOOD* 51–54 (1998). Likewise, the development of a distinct Christian sect during this time might be seen as partially a reaction to events that seem to put into question God's ancient covenant with the people of Israel. See JACK MILES, *CHRIST: A CRISIS IN THE LIFE OF GOD 109–18* (2001). Finally, Christianity and Judaism still share a large portion of the same scripture.

mean for us *today*? In most such settings it will not be sufficient for the legal historian to simply say, we now know more about our legal past than we did before. The work must have some contemporary significance to satisfy the demands of this audience. Whitman understands this.

Whitman does not shy away from the contemporary implications of this history. Not at all. Indeed, his efforts in this regard are refreshingly candid. While his policy arguments are too briefly presented to be truly persuasive, he includes a number of points that are intriguing, even provocative, especially for a reviewer with, frankly, his own contemporary agenda.

Whitman first addresses the immediate significance of this history. He says it explains the confusion that the beyond-a-reasonable-doubt rule can inspire in 21st-century jurors. He writes:

[T]he reasonable doubt formula seems mystifying today because we have lost sight of its original purpose. The origins of reasonable doubt lie in a forgotten world of premodern Christian theology, a world whose concerns were quite different from our own. Our modern law is the product of a deep transformation, in the course of which some of the old religious foundations of the criminal trial were forgotten. (P. 2.)

And, the reasonable doubt formula:

was the product of the world troubled by moral anxieties that no longer trouble us much at all. This makes it unsurprising that our law should find itself in a state of confusion today. We are asking the reasonable doubt standard to serve a function that it was not originally designed to serve, and it does its work predictably badly. (P. 5.)

I do not doubt that if we were to start from scratch, we might come up with a more readily comprehensible standard of proof for jurors than what appears in reasonable doubt instructions today. I do wonder, however, how much effect modernizing the language and explicitly focusing jurors' attention on factual proof rather than moral judgment would have in most cases. After all, every decent criminal trial attorney has his or her own set piece about reasonable doubt to be used in final argument, explaining the rule in a manner that jurors can readily comprehend (or so the attorney believes). In passing, Whitman also raises a larger question about the alleged genius of the common law method, the way it puts old legal forms to new uses. At least in this instance, he argues that the old form, the reasonable doubt standard, poorly serves the law's modern needs, being focused on moral judgment rather than factual proof.

Whitman, however, has larger concerns than the wording of jury instructions. He has problems with the basic structure of contemporary jury trials in U.S. criminal cases, especially the elaborate rules of evidence which restrict the facts that a jury may hear, forcing them to solve the factual puzzle with many pieces missing. He notes that despite the beyond-a-reasonable-doubt rule and manifold

procedural protections, juries still get the facts wrong sometimes and convict the innocent. He observes: "This is hardly surprising, given the strangely fragmentary factual puzzles they are asked to solve; creating artificial mysteries is a weirdly oblique way of pursuing the high moral goal of protecting the innocent." (P. 208.) As have a number of recent commentators, he argues that the continental approach to factual assessment at trial makes more sense, citing specifically French and German law.

Although I am largely sympathetic to this critique, it is not presented in sufficient depth to be persuasive, nor does it relate well to the history presented. Here particularly, Whitman's skimping on the modern political role of the jury limits the power of his argument. The American devotion to juries today turns as much on their potential to serve as a moral and political check on executive and even legislative authority, as it does on their particular skills in fact finding. Perhaps this political role is itself archaic, given the highly representative nature of our democracy today, but still, it is a critical part of the discussion about juries. This political role may also connect to a final modern implication of this history that Whitman alludes to briefly, and on which I wish to enlarge, though only briefly.

Whitman uses as an epigram for his conclusion, a quotation from a first century BCE (Before Common Era) writer, Publilius Syrus: "The judge passes judgment on himself as much as on the offender." (P. 202.) Whitman argues that criminal judgment is always a test of the character of the judge as well as perhaps of the accused. He questions how well contemporary criminal processes comprehend this though. "The larger truth is that we have slowly been losing the capacity to gaze into our own breasts and ask ourselves hard questions about when and how we have the right to punish others." (P. 7.) He writes:

[W]e have lost the old conviction that judging and punishing are morally fearsome acts. We have a far weaker sense than our ancestors that we should doubt our own moral authority when judging other human beings Open-hearted human beings condemn others in a spirit of humility, of duteousness, of fear and trembling about their own moral standing. That is what our ancestors, for all their bloodiness, believed; . . . (Pp. 211–12.)

In this regard, Whitman makes specific mention of the ready use of long sentences of incarceration in the United States. (Pp. 211–12.)

But can this notion of "fear and humbling" actually inform law? What would such a jurisprudence look like? Two different aspects of contemporary punishment practices—the law regulating the imposition of the death penalty and that governing the imposition of life sentences—suggest an answer.

With respect to the death penalty—and a great deal of Whitman's history is effectively about capital punishment—the United States Supreme Court has taken this notion of fear and trembling very seriously, albeit using rather different

language, and to some extent, reasoning. As Justice Antonin Scalia and others have noted, the Eighth Amendment capital punishment jurisprudence is in some respects inconsistent and illogical, requiring, on the one hand, decision-making according to rules, and on the other, insisting that sentencers may consider a wide range of potentially mitigating evidence.²⁷ First, it's worth noting that all constitutionally approved systems of capital punishment in the United States provide for jury participation in sentencing, and in most but not all instances, death requires jury approval.²⁸ This is not a decision left to judges who, by professional training, will be less inclined to rely on *personal* conscience. Juries must be allowed to hear and consider all manner of evidence, including essentially a life history of the defendant.²⁹ Mandatory death penalties are prohibited, regardless of how restrictive the legal conditions for such a mandate are.³⁰ Juries must be accurately informed of their primary responsibility for the decision.³¹ In short, the jurisprudence of death suggests that it is proper only when rendered by a jury that takes personal responsibility for it—a jury, in other words, that approaches its task with fear and trembling.³²

By contrast, there is no special jurisprudence of life imprisonment. Such sentences are almost always rendered by a judge, not a jury. Indeed, juries are often kept in the dark about the penal consequences of their verdict. What might appear to the jury a simple theft or drug possession case, might actually be a Three Strikes case in which life imprisonment is at stake.³³ And why are the penal consequences kept secret from our much-hailed lay decision-makers? Because judges fear that such knowledge might affect the jury's verdict. Judges know that fear and trembling at inflicting severe pain can change outcomes.

In fact, the trend to require minimum mandatory punishments, even mandatory life sentences, can be seen as an effort to minimize the chance that any

²⁷ See *Walton v. Arizona*, 497 U.S. 639, 656–74 (1990) (Scalia, J., concurring).

²⁸ The Supreme Court has also approved death penalty schemes in which the judge decides the final sentence, following an advisory jury decision. *Harris v. Alabama*, 513 U.S. 504, 512 (1995); *Dobbert v. Florida*, 432 U.S. 282, 295 (1977).

²⁹ E.g., *Penry v. Johnson*, 532 U.S. 782, 803 (2001); *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

³⁰ E.g., *Sumner v. Shuman*, 483 U.S. 66, 82–85 (1987); *Skipper*, 476 U.S. 1.

³¹ *Caldwell v. Mississippi*, 472 U.S. 320, 328–29 (1985) (prosecutor's argument that the jury decision was not final because of an automatic appeal found to be misleading). Cf. *California v. Ramos*, 463 U.S. 992, 1014 (1983) (permissible to instruct sentencing jury that the governor has the power to pardon defendant and override any death sentence).

³² One important caveat must be added to this generalization. All jurors must be death qualified, meaning that no prospective juror can be seated whose views about the death penalty would prevent or substantially impair the juror's consideration of life or death penalties in the case. See *Uttecht v. Brown*, 551 U.S. 1, 9 (2007); *Wainwright v. Witt*, 469 U.S. 412, 419 (1985). As a practical matter, this means that jurors with serious reservations about capital punishment may be excluded from service.

³³ See *People v. Nichols*, 62 Cal. Rptr. 2d 433 (1997) (trial court properly refused to answer jury note inquiring if the case involved Three Strikes).

decision-maker would be emotionally reluctant to convict or punish. That is because, with mandatory minimum penalties, the most important sentencing decision is often made by the legislature, or the voting public through the initiative process. Sentencing rendered in this fashion involves very little sentencer humility or concern for the individual defendant, because the actual identities of those to be sentenced are unknown at the time of the law's approval. They are identified only by their (future) label of conviction. I have written elsewhere that this should be seen as a violation of what I call emotive due process, a principle essentially congruent with Whitman's historic account.³⁴

V. CONCLUSION

The instinct to avoid hurting another who has done one no personal wrong is a powerful and yet underestimated drive in human relations.³⁵ Sympathy and empathy for others provides the emotional foundation for morals, which in turn guides criminal law. But instinct is not moral principle, and fellow feeling is far from an infallible guide to judging individual responsibility. Thus we find the age-old tension between the need to judge wrongful conduct, sometimes harshly, and the desire to avoid causing another pain. The tension can be found in matters as mundane as a professor issuing final grades in law school, or as momentous as a verdict that will trigger a punishment of death or life in prison. This tension underlies Whitman's account of the making of modern criminal procedure and remains a central feature of our legal institutions today.

There is no final resolution to this tension. The question is always about striking the right balance. Too much legalization of responsibility, too much trust in rules and too little in personal conscience, and criminal judgment can become cruel, and in strange ways arbitrary.³⁶ Load too much onto the individual conscience, and judgment itself may be resisted. The decision process may seize up.

Putting aside one's view of death as a punishment, the balance struck by the United States Supreme Court between rules and discretion, and reason and emotion in capital jurisprudence, is remarkable. No person should be condemned to death without the opportunity to present his own unique value to decision-makers who must take personal responsibility for his condemnation. But should we limit this

³⁴ Samuel H. Pillsbury, *A Problem in Emotive Due Process: California's Three Strikes Law*, 6 BUFF. CRIM. L. REV. 483, 494 (2002).

³⁵ See, e.g., LT. COL. DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY 37–39 (1996).

³⁶ This is because the impulse for mercy is driven underground, and can be expressed only in discretionary decisions such as charging, not regulated by law. And these impulses are not uniformly distributed across the defendant population. See LEGIS. ANALYST'S OFFICE, A PRIMER: THREE STRIKES—THE IMPACT AFTER MORE THEN A DECADE 8 (2005); Joshua E. Bowers, "The Integrity of the Game is Everything": The Problem of Geographic Disparity in Three Strikes, 76 N.Y.U. L. REV. 1164, 1183–84 (2001).

principle to the penalty of physical death? Sentences of life imprisonment constitute civic death. They entail extraordinary pain and loss.³⁷ I believe such penalties should not be inflicted without making an individual judge, or perhaps jury, personally responsible for the decision, rather than just functioning as the implementer of pre-existing law.

Whitman's book is about legal bloodshed and the struggles of religious and legal authorities to justify and guide that bloodshed. Here the human instinct against harming others is the strongest. But the time has come to recognize that bloodshed is not the only form of violence, and physical death not the only form of severe punishment, that should be approached with humility and trepidation.

I sometimes think if Americans could, just for a few moments, feel the weight of the time served by prisoners in this country—all 2.3 million of them—the nation's penal policies would begin to shift.³⁸ But with prisoners out of sight, and physically supported by the state (even if poorly), the moral instinct to refrain from harm is blunted. We may recoil at the casual cruelties of our ancestors, but I suspect they might be impressed by our own.

³⁷ See Robert Johnson & Sandra McGunigall-Smith, *Life Without Parole, America's Other Death Penalty: Notes on Life Under Sentence of Death by Incarceration*, 88 THE PRISON J. 328, 328 (2008).

³⁸ The 2.3 million figure is taken from a study of the nation's prisoner population at the end of 2007. See N.C. Aizenman, *New High in U.S. Prison Numbers*, WASH. POST, Feb. 29, 2008, at A1.